Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OTIS EDWARDS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Fifth Division.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was the Petitioner denied due process of law in violation of the Fourteenth Amendment by the fact that his conviction was affirmed under a criminal statute for violation of which he had not been charged?

Was the Petitioner denied due process of law in violation of the Fourteenth Amendment by the fact that his conviction was affirmed even though there was a failure to prove him guilty beyond a reasonable doubt of the essential elements of the crime charged?

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PRAYER

The Petitioner, Otis Edwards, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District.

OPINION BELOW

The opinion of the Appellate Court of Illinois (Petitioner's Appendix A) is reported at 243 Ill.App.3d 280, 183 Ill.Dec. 548, 611 N.E.2d 1196 (1st. Dist. 1993).

JURISDICTION

The opinion of the Appellate Court of Illinois (Petitioner's Appendix A) was entered on February 19, 1993. The petition for rehearing was denied on April 13, 1993. A petition for leave to appeal to the Supreme Court of Illinois (docket number 75677; Petitioner's Appendix B), was denied on October 6, 1993. This petition is being filed within 90 days of the denial of the petition for leave to appeal. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

The nature of the case is as follows: On July 20, 1989, in Chicago, Cook County, Illinois, Petitioner was charged in a grand jury indictment along with two co-defendants, Lennon Hayes and Rodney Wilson.

The indictment was in six counts. All defendants were charged with first degree murder in Counts I and II, conspiracy to commit armed robbery in Count III, attempt armed robbery in Count V, and armed violence in Count VI. Petitioner Edwards was the only defendant charged with solicitation (to commit armed robbery) in Count IV.

Petitioner and Hayes were tried by the Court. The bench trial culminated in Petitioner's conviction for solicitation as charged in Count IV; he was acquitted of all other charges. Wilson was tried by a jury and convicted of

second degree murder. Hayes was acquitted of all charges. Petitioner was sentenced to a four year custodial term. Petitioner's direct appeal lacking success, on February 19, 1993 the Illinois Appellate Court filed an opinion affirming Petitioner's conviction. The Supreme Court of Illinois denied the petition for leave to appeal on October 6, 1993.

The facts and evidence are as follows: On July 10, 1989, shortly after 1 a.m., Larry Henderson (L.C.) was shot and killed in the hallway of his apartment building located in Chicago, Illinois. Occurrence witnesses whose trial testimony was relevant to charges against Petitioner Otis Edwards (nicknamed "O.T.") included Timothy Washington, Kenneth Wells, and Mose Hollins. Washington testified that on said date, at about 1:00 a.m., he and several friends including the victim were seated on the front steps of a building located at 4159 West Jackson. Four people approached the fence enclosing the front yard: Lennon Hayes (nicknamed "Lenny Pooh"), Rodney Wilson (nicknamed "Wookie"), Mose Hollins and a fourth unidentified individual. Wilson, Hollins, and Hayes entered the yard and Washington stood up giving Wilson his seat next to Henderson. Wilson whispered something to Henderson who stood up and walked to the apartment building. Subsequently, Wilson fired two shots striking Henderson in the back and killing him.

Washington also testified that prior to the shooting, he heard Henderson ask, "Is that O.T.'s car?" At this point Washington stated that he saw defendant's black Lincoln Town car. However, on cross-examination Washington admitted that what he had seen was "an ordinary black Lincoln," and that while he knew that defendant had a black Lincoln, he did not know the license number of that specific car. Furthermore, he could not see who was actually driving the automobile in issue.

Kenneth Wells also testified that he was present in the front yard of the apartment building. He observed Wilson, Hollins, and Hayes enter the yard and Wilson walk up and sit next to Henderson. He saw Wilson whisper something in Henderson's ear and heard Henderson say "that's O.T.'s car." He then observed Petitioner's black Lincoln at the bus stop. However, on cross-examination Wells admitted that he could not say for sure that it was defendant's car, as he did not know defendant's license number, did not notice the license number of the car, and did not see the driver. Wells confirmed Washington's account of the shooting which ensued.

Mose Hollins testified that he was at the 4159 West Jackson building at approximately 1:00 a.m. on July 10, 1989, but denied seeing Petitioner at that time. Hollins did state, however, that Petitioner had been at that location earlier in the evening at about 9:00 or 10:00 p.m. looking for his daughter. Hollins was then confronted with both his written pretrial statement and his grand jury testimony which were identical in context. In the written statement, Hollins stated that at about 12:20 a.m., Petitioner pulled up to the bus stop right in front of the apartment building at 4159 West Jackson. At that time, Lennon Hayes got in the car with the Petitioner and drove off. They returned in about 15 minutes whereupon Hayes called Wilson over to the car. Wilson leaned into the car and conversed with the Petitioner. Then Hayes and Wilson walked over to where Henderson was seated on the front steps and the shooting then occurred in the manner described by the other witnesses.

Petitioner also gave a written statement of the events, acknowledging that at 12:30 a.m. he saw Lennon Hayes, whereupon Hayes got into his car and they began to ride around, engaged in conversation. Hayes and the Petitioner

were allegedly discussing more money for Hayes, who purportedly made a living selling dope for Petitioner. They observed Henderson outside the 4159 Jackson building. They then drove to the "spot" (a dope house at 4129 West Jackson) where they saw Wilson. Petitioner told Hayes to call Wilson over to the car. When Wilson approached, Petitioner said: "You go get your money from him (Larry Henderson) and you do the same thing to him as he did to you." The Petitioner stated that he meant that Wilson, Hayes, and Hollins should go and rob Henderson and rough him up the way Henderson had previously done to Wilson. Hayes got out of the car; he and Wilson walked back to the house where Henderson was sitting. Petitioner pulled his vehicle around to the bus stop because he wanted Henderson to see him (Petitioner) in order that Henderson know that Wilson was his worker, and "not to mess with him anymore." But shortly thereafter, Wilson ran out of the yard and said, "I killed him."

REASONS FOR GRANTING THE PETITION

I.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY THE FACT THAT HIS CONVICTION WAS AFFIRMED UNDER A CRIMINAL STATUTE FOR VIOLATION OF WHICH HE HAD NOT BEEN CHARGED.

A. The Illinois Solicitation Statute.

Chapter 38, Illinois Revised Statutes, § 8-1 provides:

> Sect. 8-1 SOLICITATION. (a) Elements of the Offense. A person commits solicitation when, with the intent that an offense be committed, other than first degree murder, he commands, encourages or requests another to commit that offense.

Thus, the statute may be violated alternatively by "commanding, encouraging or requesting" another to commit an offense. Those are three alternative, disjunctive, theories. Two are relevant here: "encouraging" and "requesting". The nature of the two are materially different, each containing mutually exclusive elements.

It is important to the issues presented to this Court that the solicitation statute be analyzed. The lead Illinois Supreme Court case construing the solicitation statute in issue is *People v. Cole*, 91 Ill.2d 172, 61 Ill.Dec. 793, 435 N.E.2d 498 (1982).[1] There a three-count indictment was returned against defendants, James D. Cole, Sr., and James D. Cole, Jr. Count 1 of the indictment charged the defendants with solicitation (to commit murder) in that they "requested" one, Haley, to murder Robert H. Jones. Count II of the indictment charged defendants with solicitation (to commit murder) in that they "encouraged" Haley to murder Jones. Count III charged a conspiracy (to commit murder). Following a jury trial in Peoria County, the defendants were acquitted on counts I and III. The jury was unable to reach a verdict on Count II, the solicitation by "encouragement." A mistrial was entered as to Count II. After denying a defense motion to dismiss that count, the trial court ordered a second trial. At that second trial, defendants were convicted, and each was sentenced to prison. The appellate court reversed the convictions, holding that defendants' second solicitation trial violated the double-jeopardy provisions of the respective Federal and State constitutions.

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[1] This Court, respectfully, will take the Illinois Supreme Court interpretation of the solicitation statute at face value. *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 251, 7 L.Ed.2d 207 (1961).

Review in the Illinois Supreme Court presented the single issue of whether or not the defendants' second trial for solicitation by "encouraging" Haley to murder Jones violated the double jeopardy provisions of the United States and Illinois constitutions.

The State conceded that there is only one crime of solicitation. It argued, however, that acquittal of solicitation by "requesting" another to commit an offense (count I) did not bar reprosecution for solicitation by "encouraging" another to commit and offense when the jury, in the first trial, was unable to reach a verdict on the latter count. The defendants argued that their acquittal on count I constituted an acquittal of the entire solicitation offense, thereby barring their further prosecution under any theory of solicitation.

On review (from the appellate decision as found at 98 Ill.App.3d 109), the Illinois Supreme Court disagreed with the Illinois Appellate Court's (double jeopardy) analysis, and while affirming the convictions, defined the independent nature of § 8-1's alternative theories. In interpreting the solicitation statute, the Illinois Supreme Court declared that:

> **Request and encouragement are two disjunctive methods** by which the offense of solicitation can be committed and reflect the legislature's intent to include varying degrees of involvement on the part of the solicitor. Here, the State charged defendants with solicitation under two theories, each brought under a separate count. The jury acquitted defendants of only solicitation by request. Its inability to reach a verdict as to solicitation by encouragement is not tantamount to an acquittal under such theory. [61 Ill. Dec. at 795; emphasis supplied]

B. The Constructive Amendment Of The Indictment.

This Court does not appreciate a judicial amendment of the charging instrument.

On July 27, 1934 at a meeting of a faction of the Communist Party in Portland, Oregon, Dirk DeJonge, was the second speaker. He spoke about the deplorable conditions in the county jail, the action of city police in relation to a maritime strike, police raids on Communist headquarters, advocated recruitment for the Party, hawked literature, etc., the meeting going on in an orderly manner.

The meeting was busted. Mr. De Jonge and two of his associates were indicted for assisting in a public meeting held under the auspices of the Communist Party which automatically, according to the State, made him liable for feloniously teaching and advocating criminal syndicalism and sabotage contrary to statute. Notwithstanding that the evidence showed neither criminal syndicalism nor the advocacy of unlawful conduct by DeJonge, he got convicted. What the evidence did show was the State's contention that the literature of the Communist Party (taken from a place other than the meeting) demonstrated that the Party, as such, advocated the doctrine of criminal syndicalism.

Nonetheless, DeJonge's conviction was affirmed by the Oregon Supreme Court. It was this Court that rescued DeJonge from his then fate of seven years in the bastille. "We must take the indictment as thus construed. Conviction upon a charge not made would be sheer denial of due process." *DeJonge v. Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed. 278 (1937).

A little more than eleven years after DeJonge's unforgettable meeting, another activist, Roy Cole, got caught up in a labor dispute. On December 26, 1945, at an oil

plant in Arkansas, Cole and a couple of cohorts obstructed Otha Williams from going to work. They were charged by way of information with preventing Williams from working by the use of force and violence, all in violation of section 1 of an Arkansas Act. Section 2 of that same Act, in much similar language, prohibited an unlawful assemblage where, by force and violence, a person was prevented from engaging in a lawful vocation. Therefore, section 2 made an unlawful assemblage a necessary ingredient, whereas section 1 did not.

Cole was not charged with violating the second section. The trial court instructed the jury in such a manner as to establish that Cole, et al., were on trial for violating section 2.

Cole and his codefendants got convicted. A codefendant's conviction was reversed by the State Supreme Court on the basis of insufficiency of the evidence. Review was sought in this Court. Certiorari was granted. The Court came to Cole's salvation. Thus in *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) it was found and held that

> . . . the State Supreme Court refused to consider the validity of the convictions under § 2, for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating § 1, an offense for which they were neither tried nor convicted.
>
> **No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.** [citation omitted] If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it

> is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. **It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . .** [299 U.S. at 200, 201; citing *DeJonge v. Oregon*, *supra*; emphasis supplied]

And that's because ". . . even a thief is entitled to complain that he has been unconstitutionally imprisoned as a burglar."[2]

Turning to the cause at bar, we find that Otis Edwards, Your Petitioner, was charged by Indictment, not Information, with the offense of solicitation under one of the statute's disjunctive elements. As the Illinois Appellate Court stated:

> Defendant also argues that his fundamental right to be tried on a charge actually made has been violated because his conviction rests upon a constructive amendment of the charging instrument. In the instant action, defendant was charged by indictment with the statutory offense of solicitation, specifically by means of encouragement. (Ill. Rev. Stat. 1985, ch. 38, par. 8-1) The language at issue in the indictment provided as follows:
>
> "Otis Edwards committed the offense of SOLICITATION in that HE, WITH THE INTENT THAT THE OFFENSE OF ARMED ROBBERY BE COMMITTED AGAINST LARRY HENDERSON, ENCOURAGED RODNEY WILSON AND LENNON

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[2] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2791, 61 L.Ed. 560 (1979). See also: *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 236, 58 L.Ed.2d 207 (1978); *Garner v. Louisiana*, *supra*.

> HAYES TO COMMIT THAT OFFENSE IN VIOLATION OF CH. 38, sec. 8-1 (38-18-2) OF THE ILLINOIS REVISED STATUTES 1985."
>
> While the solicitation statute referred to above, may be violated (and charged) alternatively by "commanding, encouraging, or requesting" another to commit and offense (*People v. Cole* (1981) 98 Ill.App.3d 309, 424 N.E.2d 393), defendant was charged solely with encouraging Rodney Wilson to commit the offense of armed robbery . . . [Appendix A at pp. A-8 & 9; 183 Ill.Dec. at 553]

In light of the above, in the normal course of events one would think that the Petitioner's claim of "foul" is more imaginary than real.

The Illinois Supreme Court interpretation of the solicitation statute (*People v. Cole, supra,*) is all important to a resolution of the issues now before this Court, for it firmly establishes what the Illinois Appellate Court glossed over and did not accept: Where solicitation by "encouragement" is charged, the idea to commit a crime must originate with another (here Hayes and/or Wilson), and the defendant (here Your Petitioner) "encouraged" its commission. Solicitation by "request", on the other hand, requires that the idea to commit a crime originate with the defendant (here Your Petitioner) who then "requests" another to commit it. Any other interpretation would render the Illinois Supreme Court decision in *Cole* a nullity.[3]

But the State offered *no proof* upon the indicted charge, asserting, however, that Petitioner Otis Edwards committed solicitation under an alternative (disjunctive) theory.

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[3] Not merely "intellectually interesting" as stated by the Illinois Appellate Court. (Appendix A at p. A-11, footnote 2; 183 Ill.Dec. at 554, footnote 2)

And that theory was not the one charged.

And is one whose elements are materially different and mutually exclusive from the theory charged.

Nonetheless, the trial court adopted the uncharged premise advanced by the State and convicted Petitioner Edwards, thereby amending the indictment. That is a "foul" (a real one), a violation of Petitioner Edwards' constitutional right to due process.

As the Illinois Supreme Court opinion in *People v. Cole* makes clear, request and encouragement are separate theories. Acquittal upon one theory does not preclude conviction upon another because each theory involves different elements. This is the proposition which clearly demonstrates that the trial court's finding constitutes an impermissible constructive amendment of the indictment. Here the trial court allowed the evidence (of request) to broaden the charge actually made (encouragement) and entered a finding of guilty. The trial court broadened the charge to include the theory of request—a theory not charged in the indictment. That is the precise point that the Illinois Appellate opinion misses.

The question presented is not one of variance, but rather of constructive amendment of the charge and of a failure to prove the charge actually made.[4] The Seventh Circuit Court of Appeals defined the dichotomy as between variance and amendment in *United States v. Mosley*, 786 F.2d

[4] We know the Illinois Appellate Court appreciated the premise. "The essence of defendant's argument is that the State offered no proof based on the encouragement theory, but provided evidence only on the alternative theory of solicitation by request which was never charged, thereby impliedly amending the indictment and violating defendant's constitutional and statutory rights." (Appendix A at p. A-9; 183 Ill.Dec. at 553)

1330 (7th Cir. 1986) when it stated, while affirming Mosley's conviction, that:

> Mosley commingles his fatal variance challenge with an assertion that the District Court improperly amended the indictment. The two theories of error have some resemblance. However, "[a] judicial amendment of the indictment, whether implicit or explicit, is *per se* reversible error, . . . while a variance in proof from the original indictment justifies reversal only when the defendant has been prejudiced (citations omitted). "[A]n amendment occurs 'when the offense proved at trial was not fully contained in the indictment, for trial evidence had "amended" the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment.' ". . . to find a constructive amendment the crime charged in the indictment must be "materially different or substantially altered at trial, [so that] it is impossible to know whether the grand jury would have indicted for the crime actually proved." [786 F.2d at 1335; emphasis in original]

An indictment is constructively amended when the court broadens the indictment to include (a) an offense not stated in the charge, or (b) permits conviction of the stated charge upon facts materially different than those alleged. Here the trial court constructively amended Count IV to include the uncharged theory of "request." The trial court violated Edwards' Fourteenth Amendment right to due process of law.[5] The Illinois Appellate Court's opinion/decision flies in the face of *People v. Cole*.[6]

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[5] A constructive amendment is *per se* reversible. The State offered no evidence that the idea to rob Henderson originated with Hayes and Wilson and Defendant merely encouraged them. What the State charged is what the State was duty-bound to prove. It offered not a word of evidence in support of its burden.

[6] The Illinois Supreme Court version. The whole of the appellate proceedings in *Cole* make clear that the inclusion of multiple the-

(Footnote continued on following page)

Here, the State's proffer, indeed, its vehement assertions (now adopted by the Illinois Appellate and Supreme Courts) showed that Petitioner Edwards, if guilty of solicitation at all, committed it by means of "request". Perhaps Petitioner did. In fact, the evidence that he did so is overwhelming. But—that's not what he was charged with. Relative to the offense that Petitioner Edwards was charged with, the prosecution offered not a scintilla of proof.

The record contains *no evidence* to support the allegations contained in the indictment, *i.e.*, that Petitioner Edwards "encouraged" Hayes and Wilson to rob Henderson.[7]

Of course, we all know that a conviction may not be affirmed because the State may have proved at trial that the defendant committed an offense under an alternative *but uncharged theory*. That's playing a card from one's sock. A prosecutor once attempted to play a card from his hose before the Illinois Appellate court which halted him in his tracks.

> This contention is also without merit. The indictment specifies that defendant was charged with a aggravated battery under § 12-4(b)(1), the jury instructions were based upon the deadly weapon aggravated battery and the prosecution advanced this theory of ag-

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[6] *continued*

ories within a single statute does not make the proscribed offense a "single crime." Alternative theories involving materially different elements are "separate offenses" for double jeopardy and charging purposes.

[7] The whole of the evidence tending to connect Petitioner Edwards to the affair at all is found in Hollins' prior statements admitted as substantive evidence pursuant to Chapter 38, Illinois Revised Statutes, § 115-10.1 and Petitioner Edwards' own statement; the four occurrence witnesses called by the State, Walker, Washington, and the Wells brothers, did not even place Petitioner Edwards in the vicinity of (at the time of) the alleged offense.

> gravated battery in its closing argument. *We decline the State's invitation to uphold defendant's conviction on the basis of an offense with which he was not charged and which was not argued. It is clear that an appellate or reviewing court may not uphold a conviction or an offense which was not charged or proven at trial even though under the evidence defendant could have been charged and convicted of the alternate offense.* [*People v. Gresham*, 104 Ill.App.3d 57, 59 Ill.Dec. 864, 871, 432 N.E.2d 654 (4th Dist. 1980)][8]

As *People v. Cole, supra*, makes clear, § 8-1 describes three mutually exclusive and independent bases for prosecution.[9] The theory charged here was that Petitioner Edwards encouraged Hayes and Wilson to rob Henderson. In accordance with the "originator of the criminal idea" analysis aforesaid, logically necessary to give any meaning at all to *People v. Cole, supra*, Petitioner Edwards urges that the charged theory necessitates proof that the idea to rob Henderson originated with Hayes and/or Wilson, and Petitioner Edwards only encouraged them to do so. The sovereign's champions offered *no proof of that theory*. On the contrary, the only evidence tending to establish the offense of solicitation showed that the idea

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[8] See: *Cole v. Arkansas, supra.*

[9] The Illinois Appellate Court agreed with the law. Our respectful dispute centers about that law's nexus to Petitioner Edwards and his cause. "Although we recognize that a conviction may not be affirmed because the State may have proved at trial that the defendant committed an offense under an alternative but uncharged theory (citation omitted), a careful review of the record reveals that such a conviction did not occur in the case at bar." (Appendix A at p. A-9; 183 Ill.Dec. at 553)

to rob Henderson originated with Edwards who requested Hayes and Wilson to beckon unto his will.[10]

Petitioner Edwards was the genesis and moving force behind the incident:

Edwards saw Henderson;

Edwards drove in search of Wilson;

Edwards told Hayes to summon Wilson to the car—Wilson complied;

Edwards told Wilson and Hayes to "go get your money and you do the same thing to him as he did to you."

It is apparent that neither Wilson or Hayes uttered a word or even dreamed about a robbery or thought about Henderson at all before the Petitioner suggested, indeed, told the two of them to "go get your money."[11] In sum, if

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[10] The assessment is fair. We respectfully urge that the Illinois Appellate Court misapprehended its application. We do know that the Appellate Court appreciated its uniqueness, if not its viability to the cause at bar. "Defendant argues that . . . solicitation by encouragement requires that the (criminal) idea originate with the perpetrator (in this case Wilson) while solicitation by request would require that the [criminal] idea originate with the individual actually charged with soliciting (in this case, defendant). Although we find this argument intellectually interesting, it really has no bearing on our determination of the issue at bar as the language and facts of our case do not require us to draw a distinction between the words 'encourage' and 'request'. . . ." (Appendix A at p. A-11, footnote 2; 183 Ill.Dec. at 554, footnote 2)

[11] The Illinois Appellate Court was in accord factually. ". . . Hollins indicated (in his testimony before the grand jury) that he had seen defendant . . . saw Wilson walk over to the car, have a conversation with defendant, and subsequently go over to the apartment building where he shot Henderson. Defendant's own statement . . . meant that Wilson should rob the victim and rough him up a bit. . . ." (Appendix A at pp. A-9 & 10; 183 Ill.Dec. at 553)

Petitioner is guilty, he is so by request . . . but that was not charged. He is not guilty via encouragement. There is *no evidence* to indicate the Petitioner encouraged Wilson and/or Hayes to commit a robbery. Thus, Petitioner Edwards' conviction rests upon the statutory element of request, never charged in the indictment. In making its finding, the trial court necessarily amended the charge, broadening it to include the uncharged theory.

The bottom line here is that Petitioner Otis Edwards stands convicted of a charge not made.[12]

The writ should issue.

II.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY THE FACT THAT HIS CONVICTION WAS AFFIRMED EVEN THOUGH THERE WAS A FAILURE TO PROVE HIM GUILTY BEYOND A REASONABLE DOUBT OF THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

The due process clause of the United States Constitution forbids the suffering of a criminal conviction except where every fact necessary to constitute the crime charged has been proven beyond a reasonable doubt. There is no other law. In setting forth the long U.S. history of the reasonable doubt standard's application to our basic rights, this Court put the matter squarely as:

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[12] Proof at trial, even to a moral certainty, that the defendant is guilty of an offense that was not charged cannot support a conviction. *Cole v. Arkansas, supra*; *People v. Gresham, supra*; *People v. Bueno*, 35 Ill.2d 545, 221 N.E.2d 270 (1966).

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. [*In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed. 368 (1970)][13]

So has it been written—so let it be done.

Here the evidence is insufficient to support the charge.

Otis Edwards, Petitioner, was charged the offense of solicitation under one of the statute's disjunctive elements, *i.e.*, that he committed the offense as he "encouraged" others to commit an armed robbery.

But there was *no proof* offered upon that which was charged. Instead, the proof adduced was that Petitioner Edwards committed solicitation under an alternative (disjunctive) theory, *i.e.*, that he "requested" others to commit the armed robbery.[14] That theory was not the one charged; it is one whose elements are materially different and mutually exclusive of the theory charged.

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[13] See also: *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 2457, 61 L.Ed.2d 39 (1979); *Jackson v. Virginia*, *supra*, 99 S.Ct. at 2787; *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 1623, 32 L.Ed.2d 152 (1972); *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961).

[14] The evidence established that shortly before 1:00 a.m., on July 10, Petitioner Edwards and Hayes were riding in Edwards' car, when Edwards saw Henderson, the victim. Edwards then drove in search of Wilson, whom he located at 4129 West Jackson. Edwards had Hayes summon Wilson to the car and Edwards told the both of them "go get your money, and do to him what he did to you" intending, according to the statement that Wilson and Hayes should rob Henderson.

We have shown that an indictment is constructively amended when the court broadens the indictment to include (a) an offense not stated in the charge, or (b) permits conviction of the stated charge upon facts materially different than those alleged. Both infirmities have been suffered by Petitioner Edwards.

Here the trial court constructively amended the only count upon which the conviction rests to include the uncharged theory of "request." There was no proof of that. As such there has been a total failure of proof in the instant cause.

In all but the rarest of cases, a constructive amendment necessitates a failure of proof, either complete or potential. The two are indispensable to each other; they travel *in tandem*. In *People v. Bueno*, *ante*, footnote 12, defendant was charged with delivering narcotics to a police officer; the proof, however, revealed that the defendant delivered the narcotics to his co-defendant. The Illinois Supreme Court, finding a failure of proof reversed: "The State has argued this case as if the issue involved was a question of variance between the indictment and the proof and relies upon the rule that such variance is not fatal unless substantial prejudice to the defendant can be shown. We believe the principal is not applicable here. *The question is not one of variance but whether the State proved the charge set forth in the indictment.*" (221 N.E.2d at 217; emphasis supplied)

The trial court violated Petitioner Edwards' Fourteenth Amendment right to due process of law. In affirming that judgment, the Illinois Appellate Court's decision is in direct contravention to the Illinois Supreme Court holding of *People v. Cole*, *supra*.

A conviction may not be affirmed because the prosecution proves that the defendant committed an offense under another but uncharged theory. *People v. Gresham, ante,* footnote 12.

Your Petitioner therefore respectfully submits that the evidence offered by the prosecution in the case at bar was insufficient to sustain his conviction.

The writ should issue.

CONCLUSION

The grand jury charged Petitioner Edwards upon one theory—The State saw fit to try him upon another—The trial Court constructively amended the indictment and found him guilty—All of the same constituting error that is *per se reversible. United States v. Mosley, supra.* Petitioner stands convicted of a charge not made. It therefore follows that he has not been convicted by evidence establishing guilt beyond a reasonable doubt.

Wherefore, in light of the foregoing, and for all of the reasons stated herein, the Petitioner, Otis Edwards, respectfully requests this Honorable Court to grant the instant Petition For Writ of Certiorari.

Respectfully submitted,

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